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No. 90-5854

In The
Supreme Court of the United States
October Term, 1990

ROBERT H. YOUNG,
Petitioner,

v.

PHYLLIS KENNY, THOMAS MANNING,
and HENRY ROSE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Robert Young, seeking certiorari so that the Court may decide whether his prisoner section 1983 damages action is subject to the habeas exhaustion requirement, hereby responds to three of the meritless points raised in opposition:

- The assertion that the prisoners in *Wolff v. McDonnell*, 418 U.S. 539 (1974), sought damages only for conditions of confinement and not because, like Young, they had been unconstitutionally denied sentence credits.
- The assertion, contrary to the respondents' repre-

sentations below, that Young seeks injunctive relief that would affect the duration of his current term of incarceration, and that the presence of such a claim would require his action to be stayed in any case.

- The assertion, contrary to the respondents' representations below, that the issue of whether Young need exhaust his state judicial remedies is moot because he has already received administratively all the relief affecting the duration of his sentence to which, in their sole judgment, he is entitled.

THE RESPONDENTS' ATTEMPT TO DISTINGUISH *WOLFF V. MCDONNELL* IS MERITLESS

Judge Kozinski, writing for the Ninth Circuit in this case, candidly described the troubling conflict between the result that court reached and the Court's analysis in *Wolff*. Petition for Certiorari, App. A at 6a-8a. The respondents dodge the problem. They do not acknowledge the conflict, nor do they claim that the dicta of *Tower v. Glover*, 467 U.S. 914 (1984), resolves it. Instead, they attempt what the court of appeals found untenable, namely to distinguish *Wolff* from Young's case. The respondents assert that *Wolff* did not involve any claim for damages for the unconstitutional denial of sentence credits, as does Young's case, but only a claim for damages on account of conditions of confinement.

A simple reading of *Wolff* discredits this argument. *Wolff*, 418 U.S. at 553-55. Like Young, the prisoners in *Wolff* asserted that they had been unconstitutionally denied sentence credits and sought damages for these unconstitutional deprivations. *Id.* at 553 (prisoners "sought three types of relief," including damages and credit restoration, for "the taking of good time [that] violated the Due Process Clause"). It was only because the *Wolff* prisoners had sought damages for the sentence credits they were

denied that the Court had any occasion to analyze and distinguish between the restoration of sentence credits, which was barred by *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and other forms of relief for the sentence credit deprivation, like damages, that could go forward. See *Wolff*, 418 U.S. at 554-55. The damages claims that *Wolff* permitted to go forward could only be decided by determining whether the credits had been constitutionally deprived.^{1/} *Id.* at 555.

**THERE IS NO CLAIM FOR INJUNCTIVE RELIEF AFFECTING
THE DURATION OF YOUNG'S SENTENCE;
EVEN IF THERE WERE, IT WOULD BE IRRELEVANT
TO THE ISSUE PRESENTED FOR CERTIORARI**

The respondents contend that Young has a claim remaining for injunctive relief that would require the State to apply jail-time credits to reduce Young's sentence. The contention is embroidered by the insistent accusation that Young's counsel have misrepresented the relief requested by Young's pro se complaint.^{2/} This is a red herring. There was no misrepresentation; furthermore, even if a claim for injunctive relief remained it would be absolutely irrelevant to the issue on which certiorari is sought.

Young has been incarcerated, paroled, and then reincarcerated on the same sentence. His initial complaint did seek both damages for the lengthened confinement caused by denial of his jail-time credits during his *prior* term of

^{1/} In asserting that *Wolff* authorized damages only for claims relating to conditions of confinement, the respondents simply ignore the Court's statement, in the very language they quote (Opposition at 5), that damages claims arising from the unconstitutional denial of sentence credits could be pursued "*along with* suits challenging the conditions of confinement." *Wolff*, 418 U.S. at 554 (emphasis added).

^{2/} Young, an indigent prisoner, proceeded pro se in the district court and the Ninth Circuit until the time of the Ninth Circuit's first opinion. Wiebe's pro bono representation of Young began with the Ninth Circuit petition for rehearing and continues in this Court.

incarceration and injunctive relief that would compel the State to apply his jail-time credits to his *current* term of incarceration. CR 2 at 3-4 (Requests for Relief Nos. 1, 2, & 3). As the respondents admit, Young amended his complaint to drop this prayer for relief. CR 9a, 22. Contrary to the respondents, however, after the amendment there was no remaining request for "[p]rospective injunctive relief to preclude the [Indeterminate Sentence Review Board (ISRB)] from denying him jail credits." Opposition to Certiorari at 3.

The respondents' confusion apparently arises from their new counsel's misreading of the complaint's fifth prayer for relief. In it, Young asked the district court to protect its jurisdiction over his damages claim by preventing the ISRB from absolving the respondents of liability. Specifically, he sought to bar the ISRB from retroactively extending his long-past release date on his *prior*, expired term of incarceration (i.e., the one for which he seeks damages), and increasing it by the amount of the jail-time credits he had been denied.^{3/} Young feared that the effect of such an *ex post facto* extension of his prior term would be that, once his jail-time credits were properly applied to that prior term, his proper release date for his prior term would become the date on which he was actually released and his damages would be nil. In his fifth prayer, Young sought no relief affecting the duration of his *current* term of confinement.

Young's subsequent pro se pleadings in both the district court and the Ninth Circuit made clear that he was not requesting *any* relief, injunctive or otherwise, that would require the State to apply his jail-time credits to his current term of

^{3/} Young set forth this request in his complaint thus: "(5) Issue a restraining order directed at the Indeterminate Sentence Review Board, to prevent them from increasing my minimum term so they can apply my jail time credit to it and thereby absolve the other members [i.e., respondents Kenny and Manning] and Mr. Rose from liability." CR 2 at 4.

incarceration or otherwise result in his immediate or speedier release.^{4/} Before their Opposition to Certiorari, the respondents had conceded that Young was not requesting injunctive relief restoring his sentence credits and that all that remained was his damages claim.^{5/} Consequently, it was the issue of whether section 1983 damages claim must be exhausted that was actually litigated by the parties and decided by the district court and the Ninth Circuit.^{6/} See, e.g., CR 50 (Magistrate's Report and Recommendation) at 3.

Moreover, even if a claim for injunctive relief were present, it would be absolutely irrelevant to the only issue presented by the petition for certiorari: whether Young's section 1983 damages claims must be exhausted. The Court has made clear that damages claims may properly go forward even when joined with requests for other forms of relief which are barred by the exhaustion requirement. *Wolff*, 418 U.S. at 554-

^{4/} See, e.g., the following pleadings of Young: CR 44 at 1 ("Plaintiff has stated a number of times already that he is not seeking an immediate or speedier release Plaintiff has specifically requested an award for compensatory relief for damages"), 14 ("That leaves Plaintiff with percisely [sic] what he has prayed for in his Civil Rights Complaint; an award for damages."); Appellant's Ninth Circuit Reply Brief ("Transverse") at 10 ("Plaintiff has consistantly [sic] indictated [sic] to the Court that he seeks neither immediate or speedier release.").

^{5/} See, e.g., the following pleadings of respondents: CR 20 at 1 ("Plaintiff is asking this court to find that he has been illegally incarcerated and then award monetary damages. Plaintiff had also originally asked this court to apply day for day jail time credit against his maximum term but . . . filed an amendment to his pleadings striking that portion of the requested relief."), 6 ("plaintiff has stricken that portion of his complaint requesting credit off his maximum term"); CR 30 at 2 ("although plaintiff has amended his complaint striking that portion requesting day for day credit against his maximum term, he has not struck and is still asking this court to award monetary damages"); CR 34 at 1 ("Plaintiff Young has filed this complaint pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343. He is asking this Court to find that he has been illegally incarcerated and then award monetary damages."); Appellees' Ninth Circuit Brief at 5 ("Appellant does not specifically request immediate release or a speedier release").

^{6/} Nor did the Ninth Circuit, in either its initial or its amended opinions, conclude from its independent review of the record that any claim for injunctive relief remained.

55 (holding that claims for damages, declaratory relief, and prospective injunctive relief short of actual restoration of withheld sentence credits should go forward even though joined with claims for injunctive relief ordering immediate or speedier release of the type barred by *Preiser*). Thus, the question of whether Young's damages claim must be exhausted would not be answered or eliminated if he had also requested other forms of relief subject to the exhaustion requirement.^{2/}

RESPONDENTS' SUGGESTION OF MOOTNESS IS MERITLESS

In a radical reversal of position, the respondents assert that, because the ISRB credited 255 days against Young's maximum term, no factual basis has *ever* existed for either the district court or the Ninth Circuit to have stayed Young's section 1983 damages action on exhaustion grounds, and that the action should now go forward¹ without further recourse to state proceedings.^{8/} On this basis they argue that his petition is moot. In addition to being inconsistent with their prior representations,^{9/} the

^{2/} Nor, contrary to the Opposition to Certiorari at 10, would the existence of other requests for relief that must be stayed until exhausted alter the collateral estoppel analysis presented in the petition for certiorari or raise any issue of federal-state comity. The respondents do not dispute that Young's damages claim is against them individually. As the Ninth Circuit recognized, Certiorari Petition App. A at 4a, if the damages claim goes forward, any resulting judgment against the respondents would not bind the State.

^{8/} Because the respondents are sued in their individual capacity, they cannot concede exhaustion on behalf of the State, a non-party.

^{9/} The respondents previously represented to both the district court and the Ninth Circuit that, despite the ISRB's action, Young had not exhausted his remedies and argued vigorously in both courts that Young should not be allowed to proceed with his section 1983 action until after he returns to state court and exhausts his remedies. See the following pleadings of the respondents: CR 20 at 3 & 6 (informing district court of ISRB's action crediting Young's maximum term with 255 days); CR 30 at 5 ("state judicial remedies remain available and plaintiff's failure to exhaust cannot be excused"), 7 ("he has failed to exhaust his available state remedies") ("Since plaintiff has failed to
(continued...)

respondents' argument is erroneous.

The respondents, while acknowledging that Young's section 1983 action is not moot, first postulate that the only relief that Young would be entitled to in a habeas corpus action based on the State's denial of his jail-time credits is the relief that the ISRB has already granted him, and then assert on this basis that the Ninth Circuit's decision staying his action pending exhaustion is moot. To the contrary, Young has never agreed that the State has properly applied his jail-time credits to his current term of incarceration or to his parole eligibility for his current term of confinement.^{10/} See

^{9/}(...continued)

present this issue to the Washington State court's [sic] first, this petition should be dismissed for failing to exhaust state remedies."); Appellees' Ninth Circuit Brief at 7-8 ("Since there was no factual demonstration that Appellant had exhausted his state remedies, the trial court correctly concluded that the federal complaint must be dismissed for failure to exhaust.").

^{10/} The ISRB undercounted the number of days of jail-time credit to which Young is entitled. See CR 48 at 2, 5. The ISRB has also failed to meaningfully apply any of his jail-time credits to advance his minimum term release date--the date set by the ISRB for his release from his *current* term of confinement. See *State v. Phelan*, 100 Wash.2d 508, 512-18, 671 P.2d 1212 (1983). Young's parole was revoked April 10, 1987. The ISRB set his release date as October 5, 1987, and set his "good-time" release date (i.e., the date on which he would be released if he earned his maximum amount of good time on his current incarceration) as August 5, 1987. *Respondents' Memorandum in Support of Motion to Dismiss*, CR 20, Ex. 10. Both dates passed without Young's release or any further action by the ISRB to extend his release date.

Instead, on January 14, 1988, the ISRB, at the same time it was applying 255 days of jail-time credit to his maximum term, applied a portion of those 255 days to his minimum term to retroactively move his scheduled release date back to April 7, 1987; i.e., *it scheduled his release date for three days before his parole was revoked and his current incarceration began. Id.*

This strange action, by whose logic Young should never have been reincarcerated in the first place, has been of no practical benefit to him, however. He remains incarcerated today, three years and nine months after his scheduled release date. His continuing confinement beyond his release date without a hearing and a showing of some cause for his continued imprisonment and with no determination of a new release date is itself a due process violation. See *Bergen v. Spaulding*, 881 F.2d 719, (continued...)

CR 48 at 2, 5. Thus, the respondents' argument that this petition is moot because they have unilaterally decided, without any state or federal judicial determination, that the ISRB's action is the only relief to which Young is entitled must be rejected.

CONCLUSION

The writ of certiorari should be granted.

DATED: January 6, 1991

Respectfully submitted,

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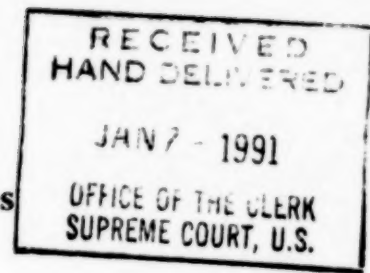
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^{10/}(...continued)
721 (9th Cir. 1989).

By asking the Court to dismiss the petition for certiorari as moot, the respondents would have the Court ratify the State's continuing constitutional violation in failing to properly apply Young's jail-time credits to his current term of incarceration.

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CERTIFICATE OF SERVICE

I, Richard R. Wiebe, a member of the Bar of this Court and Counsel of Record for petitioner Robert H. Young, hereby certify that, pursuant to Rule 29.3, on January 6, 1991, three copies of petitioner's Reply Brief in Support of Petition for Certiorari were deposited for mailing, first class postage prepaid, to

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who is counsel of record for respondents. I further certify that all parties required to be served have been served.

A handwritten signature in dark ink, appearing to read "R.R. Wiebe".

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